



LISA CARLTON
Chairman

THE FLORIDA LEGISLATURE

JOINT SELECT COMMITTEE ON NURSING HOMES

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CAROLE GREEN
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February 19, 2003

The Honorable James E. King
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, FL 32399-1100

The Honorable Johnnie Byrd
Speaker of the House of Representatives
Suite 420, The Capitol
Tallahassee, FL 32399-1300

Dear Mr. President and Mr. Speaker:

On December 16, 2002, you appointed the Joint Select Committee on Nursing Homes to address the continuing crisis facing Florida's nursing homes in both obtaining and maintaining adequate insurance coverage. The information contained in this letter is the report of the Joint Committee.

The Joint Select Committee on Nursing Homes met five times during January and February. At the first four meetings the committee heard testimony from the interested stakeholders, the Agency for Health Care Administration and the Department of Financial Services. We received written input before, during and after our meetings. We heard testimony from a wide variety of interests: the for-profit and not-for-profit sides of the nursing home industry, regulators at the Agency for Health Care Administration, representatives of the Department of Financial Services, insurance companies, attorneys who bring suits against nursing homes, unions who represent nursing home employees, nursing home administrators, nurses employed by nursing homes, Certified Nursing Assistants employed by nursing homes, physicians practicing in nursing homes, representatives of consumers (AARP and the Coalition to Protect America's Elders), and representatives of residents in continuing care retirement communities. We received over 30 written proposals for statutory changes and funding increases.

In the testimony we received, there was consensus that the Legislature accomplished important reforms with the passage of CS/CS/CS/SB 1202 in the 2001 Session. The bill required an increase in staffing in nursing homes, strengthened regulatory enforcement and quality oversight, established risk management and adverse incident reporting in nursing homes and provided significant tort reform. We received no proposals recommending that we retreat from the staffing standards established in this bill.

After hearing the testimony, there is general agreement among the members of the Joint Committee that:

- General and professional liability insurance is still difficult to come by and is expensive;
- The state does not have objective, reliable data on lawsuits against nursing homes;
- Nursing homes are having difficulty in attracting and keeping quality direct care staff;
- Although it appears that quality of care in nursing homes is improving, we do not yet have objective data to demonstrate that regulatory activities of the state are effective in ensuring resident safety; and
- Nursing homes are under financial stress due to increasing insurance premiums, increasing staff salaries, and increased staffing standards.

The committee was hampered in making decisions regarding civil enforcement against nursing homes by a lack of objective information regarding the numbers of suits which are actually filed, and the ultimate disposition of these suits in terms of amounts of damages awarded.

It is clear, that many good nursing homes in Florida are facing increases in insurance premiums and difficulty in obtaining liability coverage. The requirement in CS/CS/CS/SB 1202 that facilities maintain general and professional liability coverage has resulted in some facilities purchasing minimal liability coverage, and being forced to pay premiums that exceed the face value of the policy, in order to comply with the law. We heard testimony, however, that for nursing homes with a good track record and strong internal risk management, liability insurance is available.

We were told by the Florida Life Care Residents Association, which is made up of residents of Continuing Care Retirement Communities (who pay the entire cost of care themselves), that increasing liability insurance costs of their providers are being passed on directly to their members.

There is a considerable body of opinion indicating that we simply do not know yet whether or not the changes made to the nursing home tort system in CS/CS/CS/SB 1202 will have the desired effect of attracting liability insurance carriers back into the state. There is some suspicion that suits that are still working their way through the courts are suits that predate CS/CS/CS/SB1202 and the new standards for civil enforcement, and that until these are resolved and the law has been in effect for some time, enabling insurance companies to develop a record of actual judgments in nursing home cases using the new civil enforcement standards, liability carriers will be hesitant to return to the state.

The Joint Select Committee on Nursing Homes makes the following recommendations.

Liability Claims

We recommend that for nursing homes, the Legislature consider enacting a voluntary binding arbitration system similar to that which is currently in effect for medical providers such as doctors and hospitals. However, the committee was concerned about the differences between nursing homes and medical providers, particularly in the application of medical malpractice laws. Specifically we recommend:

- Enactment of voluntary binding arbitration in the civil enforcement provisions in chapter 400, F.S., for claims arising out of the rendering of, or the failure to render, medical care and services in nursing homes, similar to the voluntary binding arbitration provisions in section 766.207, F.S., for medical negligence.
- If the parties agree to arbitration, and the defendant does not contest negligence, causation and liability, non-economic damages are capped at \$250,000.
- If the defendant requests, but the plaintiff refuses binding arbitration, non-economic damages at trial are capped at \$350,000.
- If the defendant refuses arbitration, and the case goes to trial and the plaintiff obtains a determination of liability, there would be no limitation on non-economic damages.
- In the instance of either intentional misconduct, gross negligence, conduct motivated primarily by unreasonable financial gain, or conduct in which there was specific intent to harm the claimant, punitive damages are appropriate. The punitive damage provisions of ss. 400.0237 and 400.0238, F.S., must be available to the claimant or claimant's representative.
- The right of adult children of individuals in nursing homes to bring suit should not be limited.
- Further deliberation is necessary on how to substantively and procedurally resolve incidents determined to be either intentional misconduct or gross negligence.
- Economic damages should not be paid in periodic payments or be reduced by future collateral source payments.
- Non-economic damages should not be calculated based on a percentage basis with respect to future capacity to enjoy life.
- When nursing homes are the subject of repeated claims resolved by arbitration in which liability, causation, and negligence are not contested for similar breaches of standards of care, the licensee should be investigated by the Agency for Health Care Administration.

Liability of Nurses

Nurses working in nursing homes provided testimony that although they are dedicated to the tasks of serving residents, they are still under heavy workloads and feel exposed to the risk of

lawsuits which could end their career and devastate their personal finances. To provide relief in the area of nursing liability the Joint Committee recommends:

- The Legislature should review and clarify the liability of nurses working in nursing homes.

Collection of information regarding nursing home lawsuits

It is critical that the state have objective, verifiable information on the nature, prevalence and outcome of lawsuits against nursing homes. A substantial amount of the testimony consisted of opinions and interpretation of data collected by the Agency for Health Care Administration (AHCA) and various provider groups regarding the numbers of law suits and the size of judgments. Information currently available is all self-reported, and is not subject to verification or audit. There is some indication that the data on lawsuits collected by AHCA is incomplete. The current system of requiring nursing home licensees to report presuit notices and claims filed against them is problematic when applied to facilities that have changed ownership.

It became clear to the Joint Committee that the lack of objective information on the number of suits that are filed and the ultimate outcome of the suits has led to a situation in which all sides of the debate can cite the same AHCA data to “prove” opposing points of view. We believe that if we do not establish a source of reliable information with which to monitor lawsuits against nursing homes, we will repeatedly face this dilemma. We therefore recommend:

- The Legislature should require courts to identify liability claims brought against nursing homes under s. 400.023, F.S., in their data bases. The proposal could be carried out in several ways:
 - The Legislature could require that the Agency for Health Care Administration be notified by the clerk’s office when such lawsuits are filed.
 - The Legislature could amend s. 25.075, F.S., specifically providing that this information be collected via the courts’ summary reporting system (SRS).
 - The Legislature could ask the Supreme Court to incorporate the information in SRS because of great public need.
- The Legislature should require AHCA to collect information on claims filed against previous owners of nursing homes when there is a change of ownership, not just claims against current licensees.
- The Legislature should amend s. 627.912, F.S., to include nursing homes in the list of entities for which insurers are required to report closed claims.

Insurance availability and affordability

Considerable testimony was received regarding the availability of liability insurance for nursing homes. According to the Department of Financial Services, there are no admitted (regulated) liability insurance carriers writing nursing home liability insurance in Florida. Some larger, multi-state chains self-insure, purchasing reinsurance policies for larger risks. Liability insurance for nursing homes in Florida is available, however, from surplus lines carriers currently writing liability insurance in the state. Nursing homes report that liability insurance is becoming increasingly more expensive. The Joint Committee heard testimony that the insurance crisis is due to a number of factors. Those include aggressive lawsuits, a shortage of staff, inadequate premiums and underwriting, and lack of effective risk management within the nursing home industry.

CS/CS/CS/SB 1202 required all nursing homes and assisted living facilities to have insurance. The committee heard testimony that in some instances nursing homes are charged premiums that are higher than the coverage limits of the policies. The only exception to the requirement that a nursing home maintain general and professional liability insurance coverage is in the case of a state-designated teaching nursing home and its affiliated assisted living facilities, created under s. 430.80, F.S., which may offer proof of financial responsibility in a minimum amount of \$750,000, as provided in s. 430.80(2)(h), F.S. The Risk Retention Group that was authorized in CS/CS/CS/SB 1202 to make available affordable insurance coverage for high quality nursing homes has only recently been approved to offer coverage and is not yet operational.

Under ss. 458.320 and 459.0085, F.S., medical physicians and osteopathic physicians are permitted to demonstrate financial responsibility for paying claims and costs ancillary thereto in a variety of ways. They can establish and maintain an escrow account, obtain and maintain professional liability coverage, or obtain and maintain an unexpired, irrevocable letter of credit. Physicians who meet certain criteria are also permitted to go without insurance as long as specified notice is provided to patients.

To assist facilities that would be able to demonstrate financial responsibility, the Joint Committee recommends:

- The Legislature should permit nursing homes to demonstrate financial responsibility to pay claims and costs ancillary thereto in ways other than through professional liability insurance coverage – similar to physician financial responsibility requirements, by extending the exception allowed for a state-designated teaching nursing home to all nursing homes and assisted living facilities.

Testimony was presented which indicated that physicians who are the attending physicians for residents in nursing homes have experienced increases in liability insurance premiums. Currently

data is not available on pending claims against these physicians. The Joint Committee therefore recommends:

- The Legislature should require an examination of the prevalence and reasons for insurance rate increases and cancellations for physicians practicing in nursing homes.

Medicaid nursing home appropriations issues

The Medicaid payment system is not within the charge given to the Joint Committee. However, the committee recognized that there are fiscal matters that might complement the substantive recommendations. CS/CS/CS/SB 1202 required nursing homes to maintain minimum staffing levels for certified nursing assistants and licensed nurses. The methodology used by the Agency for Health Care Administration to calculate the Medicaid share of the additional staffing required does not take into account two factors. First, in order to meet the minimum staffing levels a facility must staff at a level slightly above minimums or risk violating the law. In addition, the inflation factors used by Medicaid to reflect future staff costs include items not related to wages (such as food and utility costs). This artificially depresses the allowable wage inflation factor.

In the 2002 Session, SB 59E directed the Agency for Health Care Administration to allow Medicaid nursing home rate increases to reflect the cost of general and professional liability insurance for nursing homes. The bill removed a restriction limiting increases to the class ceiling for a facility. The General Appropriations Act allocated funding of \$27 million for this action. This funding resulted in an average increase of about \$1.69 per day. As of January 1, 2003, 75 percent of the nursing homes report receiving a payment for their operating cost component (the component of the Medicaid rate that contains liability insurance) that is below their allowed costs. The average shortfall is \$6.74 per day.

Joint Committee members questioned the prevalence of fraud and abuse of the Medicaid nursing home payment system. Testimony was presented that indicated that there were potential savings in Medicaid nursing home expenditures by increased AHCA oversight of Medicaid payments to nursing homes.

Therefore, the Joint Committee recommends that the Appropriations Committee in both chambers review the methodology for reimbursing nursing homes to determine the appropriateness of:

- Increasing direct care gross-up by 7 percent to cover the cost of complying with staffing minimums;
- Using an inflation factor that more accurately reflects the cost of required direct care staff in the direct care component of the Medicaid nursing home rate;

- Rebasement of the Medicaid nursing home rate system to allow nursing homes to recoup the Medicaid portion of costs associated with purchasing general and professional liability insurance for nursing homes;
- Requiring all nursing facilities to file a final cost report when there is a change of ownership, even if the cost report is for a partial year and require facilities to pay a \$100 per day fine for late cost reports; and
- Requiring nursing homes to provide financial restitution to the Medicaid program if the contracted services are not provided in accordance with their Medicaid provider agreement and applicable regulations and standards of care.

Staffing Recommendations

The Joint Committee heard testimony regarding the difficulty long-term care providers are having meeting the requirements of CS/CS/CS/SB 1202 as it pertains to adequate staffing levels. Facilities testified that the minimums in law have created a situation of high demand for scarce nurses, driving up salaries. Certified nursing assistants testified that workloads in nursing homes have dropped dramatically, leading to increased attention to frail residents, however, wages and benefits are still inadequate.

- The Legislature should develop a certified geriatric nursing classification geared toward Certified Nursing Assistants who are increasing their skill level and receiving additional training in the medical aspects of providing care to the elderly in long-term care facilities. A new certified geriatric nurse classification could allow nursing facilities to provide their more capable Certified Nursing Assistants with a career ladder that would enable them to access higher rates of pay and benefits.

Quality of Care Recommendations

The Joint Committee heard considerable testimony about the quality of care in nursing homes, and the importance of giving consumers and their families access to accurate information about the care they are purchasing from a long-term care facility, and the quality of care that the facility is rendering. The Joint Committee therefore recommends:

- The Legislature should require that nursing home admission contracts be in compliance with all provisions of chapter 400, F.S.
- Allow nursing home residents who are victims of adverse incidents or their responsible party, to obtain a copy of the adverse incident report sent to the Agency for Health Care Administration, and the results of the agency's investigation.
- Revise the Agency's "Guide to Nursing Homes in Florida" by adding the following information for each nursing facility:

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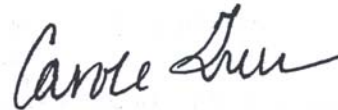
1. The number and type of substantiated Ombudsman complaints, verdicts from courts of competent jurisdiction, investigations by the Attorney General's office and the outcome;
2. Each nursing home's owner/management/chain affiliation including a history of ownership changes and all previous names;
3. A list of any enforcement actions taken against the facility over the past 36 months, including moratoriums and fines;
4. Each facility's staffing ratio and turnover ratio; and
5. A notification of whether the facility has a viable Family Council, and the contact information.

Thank you for recognizing the importance of these issues and for providing a forum for interested parties to participate.

Sincerely,



Lisa Carlton
Chairman



Carole Green
Vice Chairman